

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 26 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0174
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID ALFRED GONZALEZ,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103838001

Honorable Theresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Linley Wilson

Phoenix
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Frank P. Leto

Tucson
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HOWARD, Chief Judge.

¶1 After a jury trial, appellant David Gonzalez was convicted of second-degree burglary and possession of burglary tools. He was sentenced to presumptive, concurrent terms of imprisonment, the longest of which was 11.25 years. On appeal, Gonzalez argues the trial court’s denial of his challenge of the state’s peremptory strikes of Hispanic jurors violated his rights under the Equal Protection Clause. For the following reasons, we affirm.

Factual and Procedural Background

¶2 The facts underlying Gonzalez’s convictions are not at issue here. Gonzalez was indicted for second-degree burglary and possession of burglary tools based on a burglary of a residential structure. The state submitted an allegation of prior convictions and an allegation that Gonzalez had committed the offenses while on “probation, parole, work furlough, community supervision or any other release or escape.” The jury found Gonzalez guilty of both counts. He was convicted and sentenced as noted above. This appeal followed.

Discussion

¶3 Gonzalez argues the trial court erred by denying his *Batson*¹ challenge of the state’s peremptory strikes of four Hispanic jurors. He contends the state’s explanations of the strikes were pretextual and the strikes violated his rights under the Equal Protection Clause of the United States Constitution. When reviewing the court’s ruling on a *Batson* challenge, we defer to its factual findings, but we review de novo its application of the law. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

¹*Batson v. Kentucky*, 476 U.S. 79 (1986).

We will not reverse a trial court's ruling on a *Batson* challenge unless it is clearly erroneous. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006).

¶4 A party may not exercise a peremptory strike on the basis of race or ethnicity. *State v. Purcell*, 199 Ariz. 319, ¶ 22, 18 P.3d 113, 119 (App. 2001). A *Batson* challenge is used to determine if such a prohibited strike has been made, and it involves three steps: 1) the opponent of the strike must make a prima facie showing of discrimination; 2) the proponent must give a neutral reason for the strike; and 3) the trial court must evaluate whether the opponent has established discrimination on a prohibited ground. *Id.* ¶ 23. The neutral reason required at the second step “need not be ‘persuasive or even plausible, only legitimate.’” *Id.*, quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995). And the opponent of the strike has the burden of establishing discrimination and cannot carry that burden through inference alone. *Newell*, 212 Ariz. 389, ¶ 58, 132 P.3d at 846; *State v. Paleo*, 200 Ariz. 42, ¶ 6, 22 P.3d 35, 37 (2001) (“Throughout the process, the burden of persuasion remains on the party alleging discrimination.”). Generally, ““the fact that the state accepted other Hispanic jurors on the venire is indicative of a nondiscriminatory motive”” although “it is ‘not dispositive.’” *See State v. Cañez*, 202 Ariz. 133, ¶ 23, 42 P.3d 564, 577 (2002), quoting *State v. Eagle*, 196 Ariz. 27, ¶ 12, 992 P.2d 1122, 1125 (App. 1998). If evidence supporting a *Batson* challenge is not presented during the jury selection process, we will not consider it on appeal. *State v. Cruz*, 175 Ariz. 395, 398, 857 P.2d 1249, 1252 (1993).

¶5 After voir dire, Gonzalez objected to the state's peremptory strikes of four Hispanic jurors from the jury panel. The trial court implicitly found the defendant had

established a prima facie showing of discrimination by asking the state for its reasons for the strikes. *See State v. Trostle*, 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997). The prosecutor explained she had struck L. based on a family member's experience with the criminal justice system; B.S. because she read gossip magazines; C.S. because of his references to aliens, UFOs, and his dog telling him to call 9-1-1; and I. because she was a teacher and because of a concern about her language ability. When the court asked Gonzalez to respond to any of the reasons the state had given in support of its strikes, he did not. The court noted that the state had not struck three other Hispanic jurors and found the state's reasons to be neutral and facially valid.

¶6 Gonzalez never argued in the trial court that the state's reasons for striking the jurors were pretextual. In fact, Gonzalez never made any argument as to why the strikes were discriminatory and merely listed the four Hispanic jurors struck by the state. Because he could not carry his burden of proof based on inference alone, Gonzalez did not establish that the jurors were impermissibly struck on the basis of race or ethnicity and the trial court did not err by denying his motion. *See Newell*, 212 Ariz. 389, ¶¶ 52, 58, 132 P.3d at 844, 846.

¶7 On appeal, Gonzalez argues the state's grounds for striking the jurors were pretextual for a variety of reasons. Because he never presented these arguments to the trial court, we will not consider them on appeal. *See Cruz*, 175 Ariz. at 398, 857 P.2d at 1252; *cf. State v. Garza*, 216 Ariz. 56, ¶ 31, 163 P.3d 1006, 1015 (2007) (*Batson* challenge waived for failure to object at trial).

Conclusion

¶8 For the foregoing reasons, we affirm Gonzalez's convictions and sentences.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge